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Circuit Court For Lane County, Oregon

BY 

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

STATE ex rel DUNCAN RHODES

Plaintiff-Relator,

v.

CHERYL BETSCHART,
Lane County Clerk

Defendant.

Case No. 16-11-25041

OPINION and ORDER

This matter came before the court for hearing on December 6, 2011 and was continued to December 7, 2011. After oral argument from both counsel, hearing testimony, and reviewing documentary evidence, the court took the matter under advisement to further review authorities cited by both parties in their written submissions. The court now being fully advised the premises whereof rules as follows:

The parties are before the court on an alternative writ of mandamus issued on Relator's petition requiring the Lane County Clerk to alternatively: (1) issue a ballot title and take all other steps necessary to authorize the chief petitioners to commence the gathering of signatures to hold a referendum election on Lane County ordinance 9-11, or (2) appear in court to show cause why she has not done so. The County Clerk appeared on the date and time set by the court having first filed a motion to dismiss the writ and an alternative motion to strike portions thereof. After oral argument on those motions on December 7, the Defendant Clerk tendered an answer to the writ when the court took the motions under advisement. While the petition for the alternative writ and accompanying briefing by the Relator contain numerous allegations regarding the substantive merits of ordinance 9-11, all parties agree that the substantive merits of the ordinance are not before the court in these proceedings. Thus, the issues before this court are: (1) whether the drawing of county commissioner districts by County Commissioner Board action is subject to the referendum process, and (2) whether this issue is properly before the court at this time.

The Defendant's position is that the issue of timely drawing of county commissioner districts consistent with the Oregon Constitution, the Lane County Charter, and Oregon elections law constitutes an administrative act not subject to referendum. While there is no precise legal precedent for the issue presently before the court, there is a long line of authority that the right of

referral reserved to the voters by Article IV Section 1 of the Oregon Constitution is limited to “municipal legislation” which is defined as “something permanent, uniform, and universal.” *Long v. City of Portland* 53 Or 92, 100-1 (1909). Subsequent appellate decisions have noted that “the distinction between ‘legislative’ and ‘administrative’ matters is the distinction between making laws of general applicability and permanent nature, on the one hand, as opposed to decisions implementing such general goals on the other.” *Foster v. Clark*, 309 Or 464, 472 (1990). “If the ordinance is municipal legislation, the referendum may be invoked; if administrative, it does not apply.” *Monahan v. Funk* 137 Or 580, 581 (1931). “The critical test, for determining that which is legislative and that which is administrative, is whether the ordinance was one making a law or one executing a law already in existence...” *supra* at 585. As in many of the reported cases, both sides in this matter recognize the foregoing principles; they however disagree on how to apply them.

Relator’s counsel takes the position that all ordinances enacted in Lane County are legislative in nature. Curiously, in Relator’s offer of proof presented in court in support of this proposition, Lane County Commissioner Sorensen testified under oath that ordinances enacted by the commissioners in his experience are “generally” legislative in nature. Assuming *arguendo* that such evidence was admissible, it clearly infers that some ordinances enacted during his tenure were administrative in nature. Indeed, Oregon appellate authority does not support Relator’s position on this issue. “The form of the act is not determinative; that is, an ordinance may be legislative in character or it may be administrative [citations omitted].” *Monahan v. Funk, supra* at 584. Therefore, the court must look to the entirety of the legislative framework from which the ordinance is derived to determine whether it is subject to the referendum process.

Chapter III, Section 11 (3) of the Lane County Charter requires the Board of County Commissioners to review the population density of the five districts not less than every 10 years, which date has previously conformed to the census data on redistricting efforts of other Oregon governmental entities. The charter further requires that the modification be by ordinance. While the requirements and procedures for setting the boundaries in the Lane County Charter are permanent, the boundaries themselves are subject to change at least with each census, as those occur in 10-year intervals. Therefore, it would appear that the Board of Commissioners, in carrying out its charter mandate to review district boundaries, is acting in a classic administrative capacity implementing pre-existing law. “Acts, which are deemed to be acts of administration... are those that are necessary to be done to carry out legislative policies and purposes already declared, either by the legislative municipal body, or such as devolved upon it by the organic law of its existence.” *Monahan v. Funk, supra* at 584.

It should further be noted that the Board of Commissioners is not required by the provisions of the charter to make any changes to the district boundaries but is simply directed to review “population densities of each district and modify boundaries when necessary.” Such discretionary decisions by elective bodies executing a law already in existence have repeatedly been determined by the appellate courts to not be eligible for referral to a ballot referendum. *Long v. City of Portland, supra*; *Monahan v. Funk, supra*; *Whitbeck v. Funk*, 140 Or 70 (1932); *Tillamook PUD v. Coates*, 174 Or 70 (1944); *Foster v. Clark* 309 Or. 464 (1990).

The Defendant's position is also based upon the fact that state law is implicated in the board's action in setting voting district boundaries. ORS 246.120 authorizes the Secretary of State to issue appropriate directives to county clerks. Specifically, the statute mandates that "(a) County Clerk affected thereby shall comply with directives or instructions." In evidence before this court is a directive of the Oregon Secretary of State issued June 1, 2011 on the subject of redistricting setting forth specific criteria that must be followed. All parties in the case agree that an alleged failure to follow these directives could be subject to judicial review; however, that is not the matter brought before this court. Nonetheless, this directive by the Secretary of State is important to the issue before the court in one critical respect. When the board is acting under such procedural restraints imposed by an elected state officer fulfilling an administrative/ regulatory function, the board could not have been exercising its prerogative to enact "municipal legislation." When acting under such a directive, the board was clearly acting in an administrative capacity implementing existing law. Therefore, I find that the position of the Defendant County Clerk that the enactment of ordinance 9-11 by the Lane County Board of Commissioners was an administrative act not subject to referendum to be well taken.

While it is not dispositive to the above analysis, the court notes this decision is not inconsistent with any reported decision in Oregon regarding the subject of referendums on election boundaries because no provision of the Oregon Constitution or state law provides a process from which the drawing of any election boundaries could be subjected to a ballot determination. While the Oregon Constitution embraces the voter's right to a referendum, it has never extended that right to election boundaries.

Finally, the court must address a procedural issue raised by the Relator in the petition for a writ. Relator contends that the County Clerk had a nondiscretionary duty to immediately date and time stamp a prospective petition, specify the form on which the petition shall be printed for circulation and authorize the circulation of the petition containing the title of the measure enacted by the governing body. In this case, the Defendant County Clerk declined to issue a ballot title or to allow circulation of a petition to call for a referendum election upon the grounds that the ordinance was administrative act not subject to referendum. The Defendant contends that the statutory provisions cited by Relator are procedural in nature and it was within her discretion and duty as the County Clerk to make an initial determination regarding the validity of the prospective petition.

Essentially, it is Relator's position that he is entitled to gather signatures under a ballot title and present them to the County election official for certification and only upon certification would the County election official have a right to contest the validity of the prospective referendum through the courts. Relator's counsel contends, in his memorandum, that there is "no precedent for the Defendant's resultant refusal to comply with the alternative writ." To the contrary, numerous appellate cases cited by both parties in this case appear to have been in exactly the same procedural posture as this case - the matter having come before the courts when the election official refused to go forward with the referendum process. In none of these cases did the appellate courts express concern with the procedural posture. Indeed, in *Whitbeck v. Funk*, the Oregon Supreme Court concluded that "the act of the auditor in refusing to receive the petition for referendum was proper

and the judgment of the Circuit Court dismissing the alternative writ of mandamus was correct.”
Supra at 76.

The court also notes that further complicating the instant case is the requirement of Lane Code Section 2.640 that the effect of an ordinance shall be suspended until the date of the proclamation of the results of the referendum on the ordinance. Therefore, if sponsors of a referendum succeed in gathering sufficient signatures, the effect of the ordinance would be suspended and the boundaries would not be finally adopted six months prior to the next election, as required by Lane County Charter chapter III subsection 11(e). Stated another way, the mere exercise of the collection of initiative signatures would invalidate the boundary ordinance passed by a majority of the elected board of commissioners regardless of whether referendum eventually passed or was even an appropriate matter for a referendum. Due to the 90 day signature gathering period, an unsuccessful referendum could result in the delay of the implementation of the new boundaries for two years or alternatively could result in two different boundaries for the primary and general election within the same election cycle - an untenable result.

For these reasons I conclude, as did the Oregon Supreme Court in *Whitbeck v. Funk*, that the act of the County Clerk in refusing to process the perspective petition was proper, and the alternative writ of mandamus is HEREBY DISMISSED.

Dated this 9th day of December, 2011.



Charles D. Carlson, Circuit Court Judge